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IN THE

Supreme Court of the United States

October Term, 1967

No. 929

JAY LEE GIBSON, *Petitioner*

v.

L. D. JOHNSON and BROTHERHOOD OF LOCOMOTIVE ENGINEERS, *Respondents*

PETITION FOR WRIT OF CERTIORARI
To the Court of Civil Appeals for the Twelfth Supreme Judicial District of Texas

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To the Honorable Supreme Court of the United States of America:

Petitioner respectfully petitions this Honorable Court to grant the Writ of Certiorari to the Court of Civil Appeals for the Twelfth Supreme Judicial District of Texas, the highest court of the State of Texas in which a decision in this case could be had. In this behalf, Petitioner shows unto the Court:

OPINION OF THE COURT BELOW

The opinion of the Honorable Court of Civil Appeals appears at 414 S.W.2d 235, and is shown in Appendix A.

STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

The jurisdiction of this Court is based upon the Act of Congress of June 25, 1948, c. 646, 62 Stat. 929, Title 28, U. S. Code, Sec. 1257 (3) providing that this Court may, by writ of certiorari, review any final judgment or decree rendered by the highest court of a state in which a decision could be had, where any title, right, privilege or immunity is specially set up or claimed under the Constitution, Treaties, or statutes of, or commission held or authority exercised under, the United States.

The asserted right lies under an Act of Congress of June 23, 1947, c. 120, Title III, Sec. 301, 61 Stat. 156, Title 29, U. S. Code, Sec. 185 (b). Respondent Brotherhood is a "Labor Organization representing employees in an industry affecting commerce" as defined in Title 29, Sec. 152 (5), U. S. Code, 61 Stat. 137. This asserted right arises out of alleged misfeasance in the handling of a grievance under provisions of Sec. 153, Title 45, U. S. Code, 44 Stat. 578; 48 Stat. 1189.

Summary judgment adverse to Petitioner was entered by the District Court of Anderson County, Texas, on the 31st day of March, 1966 (Appendix D) and timely appeal was filed in the Court of Civil Appeals for the Twelfth Supreme Judicial District of Texas, at Tyler on May 20, 1966. The opinion of that Court affirming the adverse judgment is dated and filed March 30, 1967.

Motion for Rehearing filed by Petitioner April 12, 1967, was overruled May 4, 1967, and he filed a timely Application for Writ of Error with the Supreme Court of

Texas May 29, 1967, and the same was refused July 26, 1967. Motion for Rehearing, filed August 9, 1967, was overruled October 4, 1967, thus closing the last available Court in the State of Texas to this Petitioner.

Thus the Court of Civil Appeals was the highest State Court in which a decision could be had in this case, and the Petitioner seeks review of the action of that Court, March 30, 1967, affirming the summary judgment adverse to Petitioner.

QUESTIONS PRESENTED

(1) Whether an adverse ruling by the National Railway Adjustment Board under Sec. 153, Title 45, U. S. Code, estops Petitioner from asserting a claim against his Union and its officers based upon their undeniable misfeasance in handling a grievance pertaining to his right to return to service;

(2) Whether the denial of rights otherwise available under Sec. 153, Title 45, U. S. Code, solely because the employee has successfully asserted a claim for personal injuries in a negligence action against his employer under the Federal Employers Liability Act, Sec. 51-60, Title 45, U. S. Code, "limits or impairs the rights of employees under any other act or acts of Congress," contrary to the provisions of Sec. 58, Title 45, U. S. Code, Act of Congress April 22, 1908, c. 149, sec. 8, 35 Stat. 66.

(3) Whether the assertion of a claim for damages for negligence under the Federal Employers Liability Act, alleging "impairment" of capacity to work on account of the employer's negligence, permanently estops the employee from claiming a right to return to service under the operating agreement of his brotherhood upon regain-

ing and establishing ability to resume his duties as an engineer, where he has been retained on the duty roster of his employer throughout the pendency of his F. E. L. A. suit and down to and including the time of requesting a return to service.

STATUTES INVOLVED

29 U. S. Code Sec. 185 (b)
45 U. S. Code Sec. 153
45 U. S. Code Sec. 58

STATEMENT OF MATERIAL FACTS

This action was brought by Petitioner, a Railroad Engineer and dues-paying member of Respondent Brotherhood of Locomotive Engineers, for damages arising out of the mishandling of a grievance with his employer. More than one time limit was violated by the Union. Petitioner and his attorney were excluded. (Gibson Depo. p. 90-91; Johnson Depo. p. 34-36). Various steps in the prescribed grievance procedure were taken in the wrong order or omitted or re-traced. The appeal to the National Railway Adjustment Board was filed too late for Petitioner to get his back pay for the time he was denied a right to return to work while his name was in its regular place on the duty roster. Respondents, in support of their Motion for Summary Judgment, were unable to show anything they had done right; they did not assert the right to Summary Judgment because of any asserted diligence or good faith on their part. (Motion for Summary Judgment, Tr. 71).

In this, as in other such cases, Petitioner, as an employee-member of the Union, was not a party to the proceedings before the Board, or the grievance procedure leading up to the abortive appeal. If the Union had refused

outright to handle the grievance, Petitioner possibly may have had a right to a direct suit against his employer, but the Union assumed to handle the grievance and Petitioner was forced into the procedure called for by the Operating Agreement, relying solely upon the good faith and diligence, if any, of his Union and its officers.

The request to return to service was denied by the employer on the ground that Petitioner had "disqualified" himself by filing the Federal Employers Liability Act suit based upon negligence of the employer.

The ruling of the Board unfavorable to Petitioner was on the stated grounds (1) that his appeal was filed too late (Tr. 56) and (2) that his successful prosecution of the negligence case under Sec. 51-60, Title 45, U. S. Code (F. E. L. A.), permanently estops Petitioner from asserting a right to return to work. (Tr. 65-67).

The second holding was not compelled, as a matter of law, because Petitioner had not alleged occupational disability in his F. E. L. A. case. He only claimed "impairment" of general ability to earn money (Tr. 38). He did not obtain judgment for total and permanent occupational disability (Tr. 41). The amount did not fully cover loss of earnings accruing as of the time of the request to return to service. There was no compensation for future disability, although it was alleged. The Honorable Court of Civil Appeals errs in saying there was evidence that Petitioner had alleged Total and Permanent Disability. (The amended petition in the F. E. L. A. suit appears as Appendix F). That case has been before this Court on Writ of Certiorari to the Supreme Court of the State of Texas on other points. Thompson v. Gibson, 335 U.S. 18, 78 S.Ct. 2, 2 L.Ed.2d 1; Thompson v. Gibson, 290

S.W.2d 305; Thompson v. Gibson, 298 S.W.2d 97; Thompson v. Gibson, 310 S.W.2d 564.

The case at bar is not complicated with any complex rule of procedure peculiar to the Courts of Texas. The Honorable Court of Civil Appeals accepts without limitation the proposition that Respondents could not be entitled to summary judgment unless they, as movants, show as a matter of law that Petitioner had no cause of action before the National Railway Adjustment Board. (P. 4, Opinion of the Court, Appendix A). However, the Court erroneously bases its finding that Petitioner had no cause of action as a matter of law upon the single fact that the Board found against him.

Thus the Court accepts the doctrine, only partially stated in the Motion for Summary Judgment, but fully explored in Respondents' brief in the Court of Civil Appeals, that Petitioner is bound by the findings of the Board, even though said findings were procured through the efforts of respondents themselves, in a proceeding to which Petitioner was not a party.

The questions presented by this Petition therefore arose in the Trial Court with the granting of the Motion for Summary Judgment, which, in turn, was based solely upon the order of the National Railway Adjustment Board (Tr. 71).

REASONS FOR GRANTING THE WRIT

Although there may be some possible explanation for the result before the Board, erroneous as it may have been, it is felt that Respondents, as movants, wholly failed to show any reason why the Board was compelled, as a matter

of law, to apply the doctrine of collateral estoppel. The Court of Civil Appeals accepts this as the correct burden of respondents, but finds the solution in the very decision of the Board itself, rather than the facts presented in the Motion for Summary Judgment. The Court holds, in effect, that if there is evidence to support a holding of collateral estoppel, then the Union is entitled to summary judgment based upon the Board's finding. This is tantamount to saying that Petitioner is bound by findings of the Board, even though he is alleging that those findings were brought about by the misdeeds of the Respondents. It is accurate to say that Respondents mishandled the case, and had no satisfactory explanation for it; Petitioner alleged and testified that they did so from personal motives. Should Petitioner be denied his right of redress for this wrong by the very fact that such misdeeds resulted in an adverse ruling?

This Court, in the case of *Vaca v. Sipes,* ____U.S.____, 17 L.Ed.2d 842, 87 S.Ct. ____ (Case No. 114, decided February 27, 1967), had before it the case of a Union, in good faith, refusing to go to arbitration on the grievance of an individual employee. The Court held that the Union had a certain amount of discretion in deciding whether to arbitrate or not. In support of the good faith of the Union, the Court pointed out that the Union had secured a medical examination at its own expense, which proved to be unfavorable, and then decided against arbitration, none of which was done here. The Court discussed a number of situations in which the employee might be said to have a justiciable right against the Union or the Employer, under Sec. 301 of the Labor Management Relations Act, Sec. 185 (b), Title 29, U. S. Code. Although railroad employees are specifically exempt from

the provisions of Subchapter III, Conciliation of Labor Disputes, the remaining provisions of the Act, including Sec. 301 (29 U. S. Code, Sec. 185) protect Railroad Employees as well as others.

Section 301 provides:

> "Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor Organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets."

In *Vaca,* the Court held that a labor organization would be subject to suit under Section 301, either in State or Federal Courts. Although apparently not called upon to specifically decide the question, the court sanctioned the idea that responsibility for the consequences of "perfunctory" handling of a grievance, or "personal hostility" be the highest measure of the liability of the Union. Before the announcement of this decision, Petitioner had already set the course for this case by allegations of both personal hostility and perfunctory handling. (Tr. 2, Plaintiff's Original Petition, filed April 23, 1965). On his deposition, which was part of the Record on Motion for Summary Judgment, he gave testimony supporting these allegations. (Gibson Depo, pages 16-18; 21-22; 24-26; 32-35; 38-39; 90-91; 135-137; 141; 143; 145; 147; and 148).

It is felt that the Court of Civil Appeals was troubled with the thought that an employee has a right to sue his Union. Yet the *Vaca* case recognizes that right. This reluctance is emphatically demonstrated by the fact that, although *Vaca* was brought to the attention of the Court in Petitioner's Motion for Rehearing filed April 12, 1967 (the unofficial publication of the *Vaca* opinion in Vol. 17 L.Ed. (2), No. 8, p. 842, is dated the same date, March 30, 1967, as the opinion of the Court of Civil Appeals), that Court failed to write any other or further opinion in the light of the *Vaca* decision, and the case was, for all practical purposes, deliberately ignored by the courts below.

The same reluctance is also demonstrated by the fact that the Court refused to recognize that *Jones v. Central of Georgia,* (5th Circ., 1964), 331 F.(2) 649, the only Federal case holding that the doctrine of collateral estoppel applies as a matter of law (cited p. 5, Court's Opinion, Appendix A), had been overruled by the same Court on the same point in the only other Federal case cited by the Court, *Hodges v. Atlantic Coast Line Railroad Company,* (5th Circuit, 1966), 363 F.(2) 534. Although this state of the decisions was pointed out in both the Motion for Rehearing before the Court of Civil Appeals and in the Application for Writ of Error in the Supreme Court of Texas, both Courts ignored it, indicating that they preferred to ignore *Vaca* and intended to follow the overruled holding in *Jones v. Central of Georgia,* and the dicta in *Hodges v. Atlantic Coast Line Railroad Company,* in which Judge Gewin practically dissented from his own opinion by way of *obiter dicta.*

These cases, and those discussed therein, demonstrate that the Board is not prone to apply the doctrine of

collateral estoppel to such cases, and has refused to apply it on much stronger facts than the *Gibson* case. Even the *dicta* of the second *Hodges* decision by the Fifth Circuit would not apply here, because the amount of Petitioner's lost wages, at the time he applied for return to service, exceeded the amount of damages awarded to him.

Behind the idea for applying the doctrine of "collateral estoppel" to these cases is the thought that an employee commits a tort when he establishes in a court of law that his employer was negligent and injured him through no fault of his own. Thus, he is said to have "disqualified" himself for employment with that employer. Of course, to secure some rational connection, the doctrine is tied into the fact of a claimed disability, but it seems to be applied without regard to whether the disability in fact exists, or whether the employee is fully compensated for it. If such a rule is to be applied to railroad employees, they are then put to an election as to whether to waive important rights for partial or temporary disability resulting from the employer's negligence in order to retain the right to continued service.

In a very real sense, such a rule has the effect of "limiting or impairing the rights of employees under any other act or acts of Congress", and particularly the right to be protected in their job security under the Labor-Management Relations Act and the National Railway Labor Act, as well as the right to sue under the LMRA.

It is no answer to this to say that either the Board or the Court said Petitioner had successfully maintained a suit for total and permanent occupational disability, because he did not, and the record shows that he did not

do so. Appendix F. He was deprived of his rights, contrary to Section 58, Title 45, United States Code, just as surely as he would have been on a direct ruling by the Court, regardless of whether this end was accomplished by mis-labeling his pleadings, or by erroneously applying the doctrine of collateral estoppel as a matter of law. To say that Petitioner never had a chance to win because the Board, on facts which would have supported a finding to the contrary, concluded that he had collected damages for total and permanent disability, is equivalent to saying that in any case where the Board makes an adverse ruling the employee has no remedy against the Union. Stated another way, such a rule would require the employee to establish his case against the Union by showing that he had no chance to lose before the Board.

If the employee's suit under Section 301 against the Union is to be limited to cases where the Board has made a favorable ruling, or to cases where the Board could not have ruled otherwise, the remedy so painstakingly recognized in *Vaca* will have little value for the employee. Some remedy must be allowed in the case which can be won or lost, depending upon proper handling, and which is lost by negligence or intentional wrongdoing on the part of the employee's representative. To be sure, such cases will be difficult to establish to the satisfaction of a court or jury because of the hazards of the proximate cause question. The right should be recognized, though, and the decision of that question of fact should be reserved for a trial on the merits rather than being summarily determined as a matter of law on Motion for Summary Judgment.

CONCLUSION

It is respectfully submitted that the opinion and ruling of the Trial Court and the Court of Civil Appeals in this case is in direct conflict with the provisions of Section 58 of the Federal Employers Liability Act; that the denial of the right to sue the Union and its officers for misfeasance in handling the grievance, which denial is based solely upon the fact that there was an adverse ruling by the Board in the case handled by the Union itself, denies this Petitioner all the rights which this Court recognized in *Vaca v. Sipes;* that therefore a Writ of Certorari should be granted in order that this Court might review the record and the adverse ruling made by the Court of Civil Appeals and the Trial Court, and the refusal of a writ of error by the Supreme Court of Texas, and finally reverse the judgment of the Court of Civil Appeals and render judgment in favor of Petitioner that he is entitled to his trial by jury, and Petitioner prays for such other and further relief, general and special, at law and in equity, to which he may be justly entitled.

Respectfully submitted,

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By_____
Attorneys for the Petitioner

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing petition for writ of certirari has been mailed, on the 15th day of December, 1967, to the respondents' attorneys, as follows: Messrs. Garrison, Renfrow, Zeleskey, Cornelius & Rogers, P. O. Drawer 1448, Lufkin, Texas.

HARRY D. MOORELAND